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RE: FCC Draft Notice of Proposed Rulemaking, Wireless Infrastructure

Introduction:

My name is Aaron Payment, and I am the Chairperson of the Sault Tribe of Chippewa Indians. As a member and leader of the tribe, I speak on behalf of my community, which is over 43,000 strong.

First and foremost, tribes are governments. The United States relationship with Tribes is constitutionally based and is supported by treaties, federal law, and numerous Supreme Court decisions.

The Sault Tribe has a sovereign right to advocate for the preservation and protection of historic and cultural sites through participation in the Section 106 Review Process, a process that we believe has resulted in the preservation and protection of many tribal sacred and cultural sites. We strongly oppose the draft Notice of Proposed Rulemaking by the Federal Communications Commission and urge that no further action be conducted on these dockets, as stated in the following comments.

If the draft Notice of Proposed Rulemaking does move forward the Sault Ste. Marie Tribe of Chippewa Indians expects an appropriate and good faith effort to consult with all 567 tribal nations. The Commission must conduct government to government consultation with Tribal Nations across the Country. It is the Commission's obligation to the United States' 567 Tribal Nations to consult on any major changes to Federal Government processes that impact Tribal Nations. Thus far, the Commission has not conducted consultation in any form with Tribal Nations on this topic.

The Sovereign Status of Tribes:

Tribes are governments, pre-dating the United States. The U.S. Constitution recognizes Tribes as "distinct governments," along with foreign nations and the several States. The U.S. Supreme Court has described their status as "domestic dependent nations" in which Tribal governments have retained nation status and inherent powers of self-government, but are subservient to U.S. federal government powers.

Tribal Nations, therefore, are not merely another "stakeholder" or "special interest" in infrastructure permitting processes. Rather, Tribal Nations exercise jurisdiction over their retained lands and resources, both on and off the reservation. Federal permitting agencies nonetheless tend to treat Tribal Nations as members of the public, entitled to only limited information and the ability to submit comments, rather than incorporating them into decision-making processes as non-Federal governmental entities. This is inappropriate and contrary to long-recognized Tribal sovereign rights. Additional policy guidance should emphasize the United States' substantive legal responsibilities to Tribal Nations and meaningful and effective consultation as a required activity to ensure consideration and accommodation of these substantive rights.

Tribal Treaty Rights and the Federal Trust Responsibility to the Tribes:

Treaties are contracts between nations. The United States entered into more than 370 treaties with the Tribes. Within these treaties, Tribal governments retained their sovereignty rights, and ceded millions of acres of land and natural resources to the federal government in exchange for peace. The specifics of each treaty are unique, but most included federal promises to recognize and protect tribal hunting and fishing rights; some lands reserved for Tribes; and health and general welfare provisions.

As noted by the Department of Interior, the Federal Trust Responsibility is *a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (Seminole Nation v. United States, 1942). This obligation was first discussed by Chief Justice John Marshall in Cherokee Nation v. Georgia (1831). Over the years, the trust doctrine has been at the center of numerous other Supreme Court cases, thus making it one of the most important principles in federal Indian law. The federal Indian trust responsibility is also a legally enforceable fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.*

The courts have also consistently rejected arguments that the government's conduct in its administration of the trust can be tested simply by a standard of reasonableness, and they have instead required that the government meet the higher standards applicable to private trustees. The vast body of case law which recognizes this trustee obligation is complemented by the detailed statutory scheme for protection of Indian affairs set forth in Title 25 of the United States Code. In fact, "[n]early every piece of modern legislation dealing with Indian Tribal Nations contains a statement reaffirming the trust relationship between Tribal Nations and the federal government."

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2012). Federal policy must be uniform and explicitly acknowledge that the Federal trust responsibility—as recognized by the courts, Congress, and the Executive—runs across all branches of government, and each agency is responsible for upholding the United States' unique obligations to Tribal Nations.

In addition to recognizing Tribal sovereignty and upholding Tribal treaty rights, Federal agencies have a duty to fully respect and abide by the Federal trust responsibility to Tribal Nations and Indian people. Critical to this responsibility is acting in the best interests of Tribal Nations, as determined by them. Obtaining Tribal consent for Federal actions that affect them is the clearest way to uphold the trust responsibility.

Federal Consultation Requirements:

The government-to-government relationship between the United States and Tribes is Constitutionally based and is supported by treaties, federal law, and numerous Supreme Court decisions. Consultation is considered a necessary part of that relationship and has been affirmed by Executive Order in 2000 and through Presidential Memoranda in 1994, 2004, and 2009.

In carrying out its obligations and responsibilities to substantively and effectively include Tribal Nations in infrastructure permitting and development, the Federal government must also adhere to its duties under various environmental, historic, and cultural protection statutes. These statutes stand as congressional declarations of the United States' responsibilities not only to the environment and other resources, but to Tribal governments as well. In concert with the trust, treaty, and consent provisions outlined above, the Federal government must look to statutes to guide its actions with respect to Tribal Nations. Statutory obligations include those in the National Historic Preservation Act (NHPA); National Environmental Policy Act; Clean Air Act (CAA); Clean Water Act (CWA); Rivers and Harbors Act (RHA); Mineral Leasing Act (MLA); Native American Graves Protection and Repatriation Act (NAGPRA); American Indian Religious Freedom Act (AIRFA); Archaeological Resources Protection Act (ARPA); and other federal laws.

The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture." *54 U.S.C. Section 440(f).* The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places. *Id.* In the absence of a programmatic agreement such as the NPA, the NHPA is implemented through a complex regulatory scheme (the Section 106 process), which requires federal agencies to collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects. *See 36 C.F.R. Part 800.*

The NHPA sets forth two distinct requirements with regard to Tribal Nations. First, the NHPA obligates a Federal agency to evaluate its undertakings for their impact on Tribal historic properties. *54 U.S.C. 470a(d)(6)(A).* In carrying out this obligation, a Federal agency would, in most cases, need to secure the cultural and religious expertise of any Tribal Nation whose historic property could be affected in order to properly evaluate the impact of that undertaking on that Tribal Nation's historic property.

Second, a Federal agency is obligated to seek official Tribal views on the effect of an undertaking, a distinct exercise from securing the Tribal Nation's cultural and religious expertise for evaluating the impact of an undertaking. Specifically, the NHPA provides that federal agencies "shall consult with any Indian Tribal Nation and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 54 U.S.C. Section 470a(d)(6)(B) (emphasis added). The NHPA Tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to Tribal religious or cultural properties located on or off Tribal lands.

Of course, general principles of Federal Indian law recognize Tribal sovereignty, place Tribal-US relations in a government-to-government framework, and establish a Federal trust responsibility to Indian Tribal Nations. These general principles are rooted in such sources as the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, [1] the American Indian Religious Freedom Act, [1] and the Archaeological Resources Protection Act[1]), Presidential Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law, as well as the Advisory Council on Historic Preservation's policy statement *The Council's Relationship with Indian Tribal Nations* and the FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribal Nations.*

The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian Tribal Nations or individual Indians. See Alaska *Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian Tribal Nations or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973).

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[1] Pub. L. No. 101-601, Section 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. Sections 3001-13 (Supp. III 1991).

[1] Pub. L. No. 95-341, Section 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. Section 1996 (1988).

[1] Pub. L. No. 96-95, Section 2, 93 Stat. 721 (1979) (codified at 16 U.S.C. Sections 470aa-70mm (1988).

Consistent with these principles, the National Historic Preservation Act should be read broadly to support and protect Tribal interests.

In sum, the NHPA[1] is the main federal statute establishing policies and authorizing programs to support the preservation of places that are significant in American history. Many places that Tribal Nations regard as sacred are also of historic significance. If a place to which a Tribal Nation attaches religious and cultural significance is eligible for the National Register of Historic Places, then NHPA section 106 provides a process through which Federal agency officials are required to consider effects on such places and to consult with Tribal Nations on ways to avoid or mitigate any adverse effects.

> NHPA Section 106 establishes a review process for all Federal and Federally assisted undertakings,[5] requiring agencies to consider the effects of any undertaking on any historic property and to afford the ACHP an opportunity to comment. 54 U.S.C. § 306108. The section 106 process is carried out pursuant to implementing regulations promulgated by the ACHP. 36 C.F.R. Part 800.[6] The NHPA and the section 106 process have become vital procedures for Tribal cultural preservation and the protection of sacred, cultural, and traditional sites and resources. All too often, however, the section 106 process is short-circuited by summary conclusions that Tribal sites, properties, and resources are unaffected. The section 106 process is of critical importance. Infrastructure projects must faithfully hew to the requirements of this process and fulfill the spirit of the law—particularly when those procedural steps are part and parcel of meeting the trust responsibility.

The FCC Model: Regional Mapping and Tribal Impact Evaluation

The Tower Construction Notification System through the FCC is known as the model for mitigating historic preservation concerns and infrastructure development in Indian Country in a streamlined process. Allowing for Tribal Nations to work directly with applicants can allow for expedited review by bringing in the FCC for consultation as a final step. However, it is vitally important to note that this system does not absolve the FCC of its trust and consultative responsibilities.

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[4] The NHPA was originally enacted in 1966, Pub. L. No. 89-665, and has been amended many times. Formerly codified at 16 U.S.C. § 470 *et seq.*, Pub. L. No. 113-287 (Dec. 19, 2014) changed the U.S. Code designation of the NHPA from title 16 to the new title 54. 54 U.S.C §§ 300101-307107. In this memorandum, references to numbered sections of the NHPA refer to designations in the public law as amended prior to the 2014 revision of the codification, which made extensive changes in the organizational structure of the statute, as well as some minor, non-substantive changes in wording.

[5] As defined in the statute:

> [T]he term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—
>
> (1) those carried out by or on behalf of the Federal agency;
>
> (2) those carried out with Federal financial assistance;
>
> (3) those requiring a Federal permit, license, or approval; and
>
> (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

54 U.S.C. § 300320.

[6] The authority of the ACHP to promulgated regulations implementing section 106 was enacted in NHPA section 211. 54 U.S.C § 304108.

In August 2000, the ACHP established a Telecommunications Working Group to provide a forum for the Federal Communications Commission (FCC), the ACHP, the National Conference of State Historic Preservation Officers (Conference), individual SHPOs, THPOs, Tribal Nations, communications industry representatives, and interested members of the public to discuss improved section 106 compliance and to develop methods of streamlining the section 106 review process. This working group was necessary because, despite Federally-mandated consultation requirements, literally tens of thousands of cell towers had been constructed across the United States with virtually no effort by the FCC, which licenses transmission from these towers, to consult with Tribal Nations. The number of towers was going to increase dramatically in the coming years and it was clear that the FCC needed to identify an effective mechanism for seeking Tribal input, while not diluting the FCC's consultation obligation to Tribal Nations.

In these discussions, Tribal Nations acknowledged that the construction of a universal wireless telecommunications infrastructure network was vital to the economic and social future of the United States. However, Tribal Nations strongly maintained that the Tribal interests at issue were also vital both to Tribal Nations and to the United States in terms of its historic preservation goals and its identity as a nation of diverse and vibrant peoples and cultures.

As explained in greater detail below, out of these discussions a nationwide Programmatic Agreement was promulgated and the FCC implemented a system that provides for:

- early notification to Tribal Nations with regard to proposed cell tower sites;
- voluntary Tribal–industry cooperation to address Tribal concerns;
- recognition of the appropriateness of the industry paying fees to Tribal Nations for their special expertise; and
- affirmation of the FCC's ultimate obligation to consult with Tribal Nations as requested or necessary.

This system has been in place for over a decade and has expedited the communications infrastructure build-out and dramatically eased the FCC's need to consult with Tribal Nations on individual projects by providing a mechanism for the industry to work directly with Tribal Nations to address Tribal concerns before FCC consultation would have to be invoked.

Timing and Delays of Tribal Review:

The FCC and the wireless industry state that delay in the Tribal review of proposed sites is a significant impediment to wireless deployment. The FCC and wireless industry neglect to explain that Tribal delay is due to the receipt of incomplete packets.

Typically, Section 106 requests have a 30-day time period. Assuming the applicant has provided all required documentation, this is a reasonable time-period. However, often the required documents are not provided and it is impossible for the Tribe to move forward.

Tribes agree that reasonable timelines and deadlines are necessary. To achieve this, all parties must meet accountability standards. Tribal Nations can list their requirements for review within the TCNS and applicants must provide the necessary information in a timely fashion. For example, the Sault Ste. Marie Tribe of Chippewa Indians requires the following information for each project:

- a short summary of the proposed ground disturbing activity,
- legal Description of the Area of Potential Effects,
- Topo maps identifying the proposed area, and
- copies of any studies that have already been conducted regarding cultural resources and archaeology in their full format, including the SHPO report and any other reports on archaeological and cultural sites identified.

Without this information, the Tribe cannot properly review a project. Industry must make a good faith effort to provide all of the requested documents to the tribal nations; otherwise the process will have significant delays.

The Sault Ste. Marie Tribe of Chippewa Indians urges further Tribal consultation on the matter of reasonable timelines and deadlines.

Costs of Tribal Review:

The Sault Tribe Office of Cultural Repatriation does not release information related to properties of traditional religious and cultural significance to anyone outside of our sovereign nation. Through government-to-government consultation, the Sault Tribe Cultural Repatriation Specialist will review project documents to determine if any of these sites exist within the Area of Potential Effects (APE) and if so what those effects may be. If we have identified any sites of concern in our research of the project area, we will notify the proper entity of the fact.

This requires a search of historical/cultural records and archaeological records. This research is a very timely and meticulous process. Charging fees for government services is a well-practiced and common part of working with governments in America. As sovereign governments, it is appropriate for Tribal Nations to assess reasonable fees for reviewing industry applications... The Advisory Council on Historic Preservation (ACHP) Memorandum on *Fees in the Section 106 Review Process* and the Federal Communications Commission (FCC) *Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act,* both identify that "payment to a tribal nation is appropriate when the Agency or Applicant essentially asks the Tribal Nation to fulfill the role of a consultant or contractor."

Without a Tribal Nation's unique expertise in its cultural and religious history, it is impossible to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to the Tribal Nation. The Sault Ste. Marie Tribe of Chippewa Indians Office of Cultural Repatriation participates as a consultant, researching historical, cultural records and archaeological records. 36 CFR 800.4(c)(1) recognizes that Tribal Nations have "special expertise" in the evaluation of sites of importance to them. It is important to understand that tribal nations are the owners of knowledge regarding their own sacred sites and Traditional Cultural Properties (TCPs). There is no other entity that

knows and understands this knowledge better than each individual tribal nation. It would be impossible to properly evaluate the historic significance of a proposed site or its potential impact on properties of cultural and religious significance to tribal nations without consulting the tribal nations of these lands.

Indeed, Tribal Nations have unique expertise that is not replicable by individuals outside the Nation. Like access to engineering, environmental, architectural and other expertise, access to Tribal expertise should be compensated at a fair rate.

Accessing this Tribal expertise to benefit a commercial enterprise is a wholly separate issue from a Tribal Nation invoking its right to consult with the FCC. Industry applicants may confuse the Government's Section 106 consultation obligations as their own when navigating Tribal fees through the TCNS Process. In accordance with the federal trust responsibility, consultation occurs between two governments only: Tribal Nations and the Federal Government of the United States. Industry applicants seeking to use government expertise for government services is not consultation. Since wireless telecommunications companies are not governments and do not have a trust responsibility to Tribal Nations, they do not and cannot conduct consultation.

As sovereign governments, Tribal Nations determine for themselves what reasonable costs are for providing government services, in this case reviewing the impacts to historical and cultural of wireless infrastructure. Just as each state may determine and assess fees for government services on an individual basis, the same should be recognized for sovereign Tribal Governments. In 2015 the Sault Ste. Marie Tribe of Chippewa Indians Board of Directors passed resolution 2015-41 that established the fee-based consultation practice of this office. This office charges a nominal fee of $150.00 for historical/cultural records research and $150.00 for archaeological records research. This is a total of $300.00 per project, per section of land.

Tribal nations have an inherent right to protect their sacred sites and cultural properties as the original stewards of these lands. The Sault Ste. Marie Tribe of Chippewa Indians as a sovereign nation places great importance on the protection and preservation of our sacred sites and culturally significant sites, as such we have determined for ourselves what we believe to be reasonable costs associated with historical/cultural records research and archaeological records research in the Section 106 Review Process.

We understand that the Commission may be reacting to a few Tribes that are charging exorbitant fees. To this we state that the Commission needs to handle those situations on a case-by-case basis, instead of making sweeping changes to the federal policy. The federal trust responsibility requires that the government work in the best interest of all Tribes.

Areas of Interest:

The Sault Ste. Marie Tribe of Chippewa Indians, like every other tribal nation, has its own unique history that helps to develop the area of interest that the Sault Tribe claims through the FCC's TCNS system and in the Section 106 Process.

Many factors weigh in on this decision including but not limited to: aboriginal land claim, current land claim, treaty areas, migration stories, oral tradition, historic/cultural records, and archaeological records. The Sault Tribe believes it is the right of each individual tribe to dictate their own area of interest based off their own history.

The Sault Tribe would reject an attempt at certifying areas of interest because it violates the government to government relationship that the United States Federal government has with tribal nations and impede on the individual sovereignty that each tribal nation has. Asking Tribal Nations to quantify culture and provide documentation when attempting to protect historic and cultural properties rejects Tribal Sovereignty and the history of government to government relations between the US and Tribal Nations

Certifying areas of interest assumes tribal nations are not the best keepers of their own history and past. If the Commission has reason to believe that an individual Tribal Nation is expanding their area of interest in an unreasonable way to take advantage of the TCNS system, it is the duty of the FCC to remedy the situation directly with that individual Tribal Nation. Forcing all Tribal Nations to certify their culture and heritage when attempting to protect their own cultural properties, is not the proper remedy. The FCC has an obligation to make the TCNS a system that works, and that requires working with Tribal Nations individually to ensure the best outcomes for all parties. Each tribal nation understands their own traditions and culture better than any person or entity outside of the nation. Therefore, individual tribes are the best at determining their own area of interest boundaries.

Applicant Self-Certification:

The Sault Ste. Marie Tribe of Chippewa Indians Office of Cultural Repatriation would not support applicants self-certifying their own compliance with Section 106. In fact, the National Historic Preservation Act seeks to prevent this very phenomenon. We remind the Commission that the trust responsibility lies only between the federal government and Indian Tribal Nations. The role of the Commission is to protect the varied interests of historic preservation of Tribal Nations to which it is a trustee. Allowing for applicants to self-certify compliance is in direct violation of the National Historic Preservation Act and the Trust Responsibility the government has to Tribal Nations.

In addition to being against the spirit of the law, self-certification will embolden industry bad actors and result in a dramatic increase in requests for FCC intervention. Tribal Nations have expressed their concerns regarding some members of the wireless industry not working in good faith with Tribal Nations. In relying on industry's interpretation of compliance, the Commission will be called in for direct consultation by Tribal Nations more often, thus straining FCC resources and undermining the gains made through the TCNS system. It undermines the government to government relationship that tribal nations have with the federal government.

The trust relationship only exists between the federal government and tribal nations and not between the applicants and tribal nations.

It also directly violates the NHPA law and would require more FCC intervention with disagreements about consultation requirements between tribal nations and applicants.

Setting up a system to allow applicants to self-certify their section 106 compliance could lead to legal ramifications and the potential for lawsuits against the Commission.

Rights of Way (ROW):

The Sault Ste. Marie Tribe of Chippewa Indians wishes to continue to be consulted even if exclusion is adopted for facilities constructed in utility or communications rights of way on historic properties. Because the Commission is looking to permit new federal undertakings on known historic properties, by law, the Commission needs to consult with tribes. If there is an exclusion for deployment in this draft notice of proposed rulemaking where tribal involvement is most critical, it is in the discussion of rights of way.

Rights of Ways are often more sensitive areas than others concerning historic, cultural, or sacred sites. The National Historic Preservation Act specifically covers properties found in Rights of Way.

Collocations:

Collocations may not mean new ground disturbance but collocations can impose indirect effects for visual concerns. The cultural and spiritual traditions of Tribal Nations across the United States frequently involve the uninterrupted view of a particular landscape, mountain range, or other view shed. Many of our sacred, historical, and cultural sites include places where the scenery is directly related to spiritual or cultural aspects of our ways of life. While it may be true that collocation towers may pose less of a threat to sites than a tower with new ground disturbance; it does not mean that the potential for indirect visual effects should be discounted. The Commission still has an obligation to consult with Tribal Nations on collocations and on any exclusion regarding collocations. Of the 567 Tribal Nations in the US, there are may be 567 opinions on the potential effects of collocations on historic and cultural properties. This is why it is so important for the Commission to consult on major changes in policy directly with Indian Tribal Nations. One Tribal Nation may view collocation exclusion favorably while another may not. It is up to the applicant to contact each individual tribe and see which collocation towers the tribal nation is interested in reviewing.

We suggest that the Commission work directly with individual Tribal nations to come to an agreement on collocations. If a tower has already been found to have no effects to Tribal historic and cultural properties, and an applicant wishes to collocate on that same tower, without any new ground disturbance, the FCC should work with the Tribal Nation to find agreement on which towers or buildings the Tribal Nation would no longer like to review. This would satisfy Industry by allowing for known areas or towers that can be developed without the involvement of the Tribal Section 106 review, after the Tribal Nation has agreed with the FCC that it has no interest in that tower or area.

We understand that the FCC prefers to have Industry work out issues with Tribal Nations first, but with the process of finding exclusions; the government to government relationship trumps the Commission's preference to defer to Industry.

Conclusion:

The Sault Tribe has a sovereign right to advocate for the preservation and protection of historic and cultural sites through participation in the Section 106 Review Process, a process that we believe has resulted in the preservation and protection of many tribal sacred and cultural sites. We strongly oppose the draft Notice of Proposed Rulemaking by the Federal Communications Commission and urge that no further action be conducted on these dockets.

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Respectfully,

Aaron A. Payment